IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of	)	
	)	No. 62573-0-I
SAIYIN PHASAVATH, f/k/a SAIYIN HAGGERTY,	)	DIVISION ONE
Respondent,	)	
v.	)	
	)	UNPUBLISHED OPINION
T. BRET HAGGERTY,	)	
	)	FILED: July 27, 2009
Appellant.	)	

AGID, J.—T. Bret Haggerty appeals an order of protection restricting contact with his ex-wife, Saiyin Phasavath, and their two children. He contends that substantial evidence does not support the trial court's findings that Phasavath had a present fear of imminent harm. Because there was evidence of past physical abuse and past stalking, and because Phasavath demonstrated a current fear of future domestic violence, we affirm.

FACTS

Haggerty and Phasavath divorced in 2001 and have two children, TJ and Sam.[1] The parties have been engaged in contentious litigation since their divorce. This is the

[1]The children were ages 12 and 8 years old at the time this appeal was filed.

third appeal to arise out of their divorce proceedings.

In February 2005, Phasavath obtained an order of protection that, among other things, restrained Haggerty from contacting their children except as provided in an existing parenting plan.[2] A court commissioner issued the protection order, finding that Haggerty had a pattern of "taking extreme measures to inflict himself" on Phasavath and the children, based on his multiple harassing telephone calls and several unfounded referrals to Child Protective Services (CPS) against Phasavath. The commissioner also found that he failed to comply with the parenting plan and that Phasavath had a reasonable fear of his continued "infliction of imminent physical harm or assault on her and the children directly and/or indirectly."

Haggerty moved to revise the order, and the trial court denied the motion, concluding that Phasavath had established by a preponderance of the evidence that Haggerty engaged in domestic violence by stalking her. The trial court found that his multiple telephone calls, failure to follow the parenting plan, and repeated CPS referrals against Phasavath constituted harassment. The trial court also found that Phasavath established that his conduct placed her in reasonable fear that he intended to injure her, stating, "the respondent's failure to abide by the parenting plan and repeated CPS referrals can be viewed as another means of creating or causing unwanted contact with the petitioner."

Haggerty appealed, challenging the sufficiency of the evidence in support of the

[2] That parenting plan was entered in Montana and authorized Haggerty to talk by telephone with the boys on specified evenings at specific times and granted him visitation rights for one weekend per month at specified times, along with various birthdays, holidays, and school vacations.

protection order. We affirmed in an unpublished decision, concluding that substantial evidence supported the trial court's finding that Haggerty stalked Phasavath and thus engaged in domestic violence against her.[3] We noted evidence of a letter Phasavath sent to Haggerty notifying him that his repeated phone calls beyond those permitted by the parenting plan were unwelcome and that Phasavath claimed that he ignored the letter and continued to call and harass her outside of the designated times.[4] While we acknowledged that Haggerty denied making the calls, we refused to disturb the commissioner's credibility determinations.[5] We also referred to evidence of letters from Haggerty to Phasavath and her attorney establishing that he consistently pressured her to give him more residential time than was provided in the parenting plan and concluded that this "demonstrate[d] his willingness to threaten legal action to get what he wants."[6] We then concluded that Haggerty's "knowing and willful conduct, typified by his frequent phone calls outside the parenting plan's designated times and his constantly pressuring her for additional time with the children, annoyed and harassed [Phasavath] such that it qualified as 'unlawful harassment.'"[7]

We further concluded that while "not overwhelming," the evidence was enough to support the court's finding that Phasavath "had a fear of injury that a reasonable person would experience under the same circumstances."[8] We referred to her statements that Haggerty regularly invaded her space during exchanges of the children

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[3] In re Marriage of Phasavath, noted at 132 Wn. App. 1033, 2006 WL 1005003, at *5, review denied, 159 Wn.2d 1005 (2007).
[4] Id. at *2.
[5] Id.
[6] Id. at *3
[7] Id. at *4.
[8] Id.

to be physically intimidating to her, a co-worker's statement that she was frightened whenever Haggerty contacted her about the children, and her attorney's statement that there was a history of physical violence that occurred before the parenting plan was entered.[9]

In February 2006, Phasavath petitioned the court to renew the protection order, which expired on February 15, 2006. A commissioner renewed the order for one year "subject to orders which may modify the parenting plan." The commissioner found that Haggerty had not met his burden of showing by a preponderance of the evidence that he had taken steps to change his behavior.

In July 2006, the parties entered an agreed parenting plan. The parenting plan provided Haggerty with residential time with the children one weekend each month and two weeks of vacation. The parenting plan also limited Haggerty's contact with the children to weekly 30 minute telephone conversations at a specified time. The plan required that the protection order be amended to reflect the terms of the plan.

In January 2007, Phasavath petitioned the court to renew the protection order and the court entered an amended protection order with an expiration date of 2018, when their youngest child turned 18 years old. Haggerty appealed. We vacated the order on the basis that the trial court lacked authority to enter an order that extends beyond one year without a petition for a renewed order or a request for protection under a different statute.[10]

On remand, the trial court vacated the order but advised Phasavath that she could still petition for a new protection order. Phasavath then petitioned for a new

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[9] Id.

[10] In re Marriage of Phasavath, noted at 144 Wn. App. 1024, 2008 WL 1934844.

protection order, alleging, among other things, that Haggerty had been physically abusive to her in the past. She also cited a court commissioner's recent contempt finding against Haggerty for his email communication with the boys in violation of the parenting plan. On September 16, 2008, the trial court entered a new order of protection, restricting Haggerty's contact with Phasavath and the children except as provided in the parenting plan.

DISCUSSION

Haggerty contends that the evidence is insufficient to support the order of protection because there were no new allegations of stalking and the allegations of physical harm related to several years ago before the parties divorced. Thus, he argues, there was no evidence of reasonable fear of imminent harm or stalking to support a finding of domestic violence. We disagree.

We review the trial court's decision to grant or deny a protection order for an abuse of discretion.[11] We determine whether the trial court's findings are supported by substantial evidence in the record, and, if so, whether those findings support the conclusions of law.[12] Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the asserted premise.[13] Substantial evidence may support a finding of fact even if the reviewing court could interpret the evidence differently.[14] We defer to the trial court's determinations on the persuasiveness of the

[11] RCW 26.50.060(1); Hecker v. Cortinas, 110 Wn. App. 865, 869, 43 P.3d 50 (2002).
[12] Scott v. Trans-Sys., Inc.,148 Wn.2d 701, 707-08, 64 P.3d 1 (2003).
[13] Pilcher v. Dep't of Revenue, 112 Wn. App. 428, 435, 49 P.3d 947 (2002), review denied, 149 Wn.2d 1004 (2003).
[14] Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

evidence, witness credibility, and conflicting testimony.[15]

A court is authorized by RCW 26.50.060 to issue a protection order after notice and a hearing. A party seeking a protection order must allege the existence of domestic violence and declare the specific facts and circumstances from which relief is sought.[16] Because an order for protection is a civil remedy, it must be supported by a preponderance of the evidence.[17]

"'Domestic violence'" is defined in part as "(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members, (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member."[18] An allegation of recent domestic violence or a recent violent act is not required to support a petition for a protection order.[19] So long as the evidence demonstrates a present fear based on past violence, it is sufficient to support the petition.[20]

In Spence v. Kaminski, the court held that a petitioner for a protection order sufficiently demonstrated "'the infliction of fear of imminent physical harm'" in her petition alleging that the respondent continually stalked, trespassed, and harassed her in past years.[21] As the court explained, "While much of the evidence presented at the

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[15] State v. Ainslie, 103 Wn. App. 1, 6, 11 P.3d 318 (2000).
[16] RCW 26.50.030(1).
[17] City of Tacoma v. State, 117 Wn.2d 348, 351-52, 816 P.2d 7 (1991); Reese v. Stroh, 128 Wn.2d 300, 312, 907 P.2d 282 (1995).
[18] RCW 26.50.010(1).
[19] Spence v. Kaminski, 103 Wn. App. 325, 334, 12 P.3d 1030 (2000).
[20] Muma v. Muma, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002), review denied, 149 Wn.2d 1029 (2003).
[21] 103 Wn. App. at 330-31 (quoting RCW 26.50.010(1)).

hearing concerned past acts and threats, the [trial] court found that the continuing relationship of the parties, who still struggled over custody issues, presented ongoing opportunities for conflict."[22] The court also referred to the trial court's observation that the petitioner exhibited fear of her ex-husband, noting that "[h]er credibility [was] not reviewable by this court."[23] Thus, the court concluded, "The history of abuse and the [trial] court's belief that [the petitioner] fears future abuse are sufficient to persuade a rational person that she had been put in fear of imminent physical harm."[24]

In Muma v. Muma, the court upheld an order for protection supported by a petition demonstrating a current fear based on past domestic violence.[25] There, the petition was based on past domestic violence acts and the respondent's recent contact with their children in violation of the parenting plan.[26] The court concluded that the petitioner showed a current fear of the respondent and that "[t]his fear was no doubt renewed by [the respondent's] act in contacting [their child] in direct violation of the parenting plan's requirements."[27] The court explained,

> As the title of the act indicates—Domestic Violence Prevention— the legislature has made it clear that the intent of chapter 26.50 RCW is to prevent acts of domestic violence. We refuse to construe the law so as to require that Ms. Muma wait until Mr. Muma commits further acts of violence against her or their children in order to seek an order of protection.[28]

Here, the trial court found that Phasavath met her burden by a preponderance of

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[22] Id. at 333.
[23] Id.
[24] Id.
[25] 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002), review denied, 149 Wn.2d 1029 (2003).
[26] Id. at 4.
[27] Id. at 7.
[28] Id.

the evidence and established that her request for the order "was based on a present fear of harm and the previous history of domestic violence." The court referred to the ruling from the trial judge who denied Haggerty's motion to revise the February 2005 protection order, which stated that the evidence was sufficient to establish that Haggerty engaged in domestic violence by committing the crime of stalking and that Phasavath established that his conduct placed her in fear that he intends to injure her. The court also found that "[t]here are ongoing acts of the Father which have the effect of triangulating the children," and referred to the recent contempt finding based on Haggerty's use of a secret email account with the children in violation of the parenting plan. The court further found that "[t]he Father's acts of triangulation continue and the Father continues to exhibit the same conduct that [the trial judge] referenced in his 2005 decision."

While the evidence is not overwhelming, as the trial court concedes, it is sufficient to support the trial court's findings. As in Spence and Muma, the court's findings were based on evidence of past domestic violence and Phasavath's present fear of Haggerty. She presented evidence that Haggerty physically abused and stalked her in the past, that the continuing struggle over the children presented ongoing opportunities for conflict, and that the protection order was necessary to prevent further acts of domestic violence.

In her petition, Phasavath described past acts of domestic violence that included assaulting her when she was pregnant:

> Throughout our marriage, Bret was always physically, mentally and emotionally abusive to me. The final straw came one night when I was pregnant with Sam and Bret punched me in the stomach, grabbed me and

> threw me across the room. . . .
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> . . . .
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> In addition to punching me and throwing me across the room when I was pregnant, during our relationship Bret also pushed me, threw large and small objects at me, yelled and swore at me, relentlessly called me nasty names and denigrated me as a person, he forced nonconsensual sex on me multiple times (which resulted in my pregnancy with Sam).

While Haggerty denies these allegations, we must defer to the trial court on the persuasiveness of the evidence and accept the trial court's credibility determinations. Additionally, as we noted in upholding the 2005 protection order, there is evidence of a history of domestic violence that included both physical abuse and stalking.[29]

Phasavath's petition also establishes a present fear that Haggerty will continue to find ways to harass and harm her and the children. She states that she moved from Montana to Seattle to escape his abuse, but that once he was not able to physically abuse her anymore, he continued to harass her by "turn[ing] to CPS, the police, relentless phone calls and the courts to continue his abuse." She also states that when she moved to Snohomish County, he followed her and purchased two homes near her and that she eventually moved to Renton because she was and continues to be afraid of him. As she explains in her petition:

> I am more afraid of Bret today than ever. The thing that Bret has learned from his past mistakes is ways to be even more subtle in his threats to me. He has so fewer ways to threaten and intimidate me today than he has had in the past. Yet he uses them to his maximum advantage. He is still coaching TJ to say that I "abuse" the boys. He still harasses me with phone calls that are in violation of the protective order (and parenting plan).

The court found this fear credible, concluding that Phasavath established that his conduct placed her in fear that he intends to injure her. Thus, as in Spence, the history

[29] Phasavath, 2006 WL 1005003, at *4.

of abuse and the trial court's belief that Phasavath fears future abuse are sufficient to persuade a rational person that she had been put in fear of imminent physical harm.[30]

Haggerty contends that the trial court's findings that his acts of triangulation continue and that he was recently held in contempt for violating the parenting plan are not a valid basis for the protection order because they are not acts of domestic violence. But as the court recognized in Muma, violations of the parenting plan can support a finding of current fear. And as in Muma, this act of contacting the children in violation of the parenting plan no doubt renewed a current fear of Haggerty.[31] As discussed above, the trial court found credible Phasavath's claims that Haggerty continues to intimidate her in whatever way possible, including manipulating the children, harassing her about the children, and violating the parenting plan.

Haggerty's unauthorized communication with the children in violation of the parenting plan also supports Phasavath's claim that additional contact with Haggerty is harmful to the children. In her petition, she describes incidents where Haggerty incited the boys to violate the parenting plan, including the one for which he was held in contempt. She references a Family Court Services report that was submitted in support of the February 2005 protection order and indicated that without the protection order, Haggerty's additional contact with the children had harmful effects. Specifically, the report refers to a period of time where TJ was injuring himself because "he was mad at himself," when in fact he was internalizing so much pressure from Haggerty that it manifested as self-inflicted physical abuse. The recent contempt finding for Haggerty's

[30] See 103 Wn. App. at 333.
[31] 115 Wn. App. at 7.

use of a secret email account with the boys in violation of the parenting plan is evidence that he continues to pressure TJ to be secretive about his contact, which has been demonstrated to be harmful to TJ.

Haggerty further contends that the evidence shows that he is no longer a threat to Phasavath, relying on reports from his therapist and from a treatment program that he participated in domestic violence treatment and successfully completed the program. Phasavath also presented statements from a domestic violence treatment provider who opined that Haggerty had not been successful in treatment, but the trial court specifically declined to give any weight to either party's evidence. Thus, the trial court did not find this evidence persuasive, and we must defer to that factual determination.

We affirm the order of protection. Because Phasavath is the prevailing party, we award her attorney fees.

Ajid, J.

WE CONCUR:

Dwyer, A.C.J.

Schindler, C.J.